FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 28, 2009

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2008-862
v.	:	A.C. No. 15-09724-135356
SIDNEY COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 17, 2008, the Commission received from Sidney Coal Company ("Sidney Coal") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On January 8, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000135356 to Sidney Coal, proposing penalties for eleven citations and orders that had been issued to the company in September and December 2007. According to Sidney Coal, it contested four of the violations in a notice of contest docketed as Nos. KENT 2008-52 through KENT 2008-55, which have been stayed pending the assessment of a proposed penalty. Sidney Coal asserts that the company's safety director faxed the proposed assessment to its attorneys but that they have no record of having received the document. It explains that due to an undetected mechanical failure beyond its control, the proposed assessment was not contested. Sidney Coal states that it always intended to contest the

proposed assessments associated with the four orders it previously contested and requests the Commission to grant its request to reopen the proposed assessment.[1]

The Secretary states that she does not oppose Sidney Coal's request to reopen the proposed penalty assessment.[2]

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

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[1] We note that the boxes for *six* citations/orders were checked on the proposed assessment form.

[2] We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006 ("Informal Agreement"). Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

Having reviewed Sidney Coal's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Sidney Coal's failure to timely contest the penalty proposal and whether relief from the final order should be granted. We also direct the judge to determine what, if any, backup system Sidney Coal and its counsel had in case of a mechanical or other failure in faxing a document[3] and whether the operator intended to contest four or six proposed penalties. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

[3] Sidney Coal states in an affidavit that it faxed the proposed assessment to its attorneys for contest on January 17, 2008. We note that in three recent cases involving the reopening of uncontested proposed assessments which had become final, the same law firm mishandled faxes from its clients requesting that the firm contest proposed penalties. *See Road Fork Development Co.*, 30 FMSHRC 220 (Apr. 2008); *Clean Energy Mining Co.*, 30 FMSHRC 224 (Apr. 2008); *Long Fork Coal Co.*, 30 FMSHRC 228 (Apr. 2008). In each of these cases, which involved total assessments of $89,666, technical or mechanical failures involving office equipment were also cited as the reason why the proposed assessments were not contested. This case involves assessments totaling $90,598. Given the amount of penalties at stake, the existence, or non-existence, of systems to prevent chronic or recurring errors of this nature is relevant to the Chief Administrative Law judge's determination of whether the neglect in this case was excusable. We note that courts have held in Rule 60(b) cases that mistakes resulting from institutionalized procedures, or lack of "quality control" type of procedures, are not excusable. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 938-939 (5th Cir. 1999).

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